IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.342 of 2003

Mr.Namdeo Dagadoba Pashankar & anr. Appellants
Vs.
Mr.Narayan Dagadoba Pashankar & ors. Respondents

Mr.Nitin Jamdar for appellants.
Mr.H.D.Gole for resp.no.1.
Mr.P.S.Dani with Mr.G.H.Keluskar for resp.nos. 2 & 3.
Mr.R.G.Ketkar for resp.no.4.

CORAM: B.H.MARLAPALLE, J.

April 11, 2007.

P.C.

1. Heard Mr. Jamdar, the learned counsel for the appellants who were impleaded as defendant nos.1 and 2 in Regular Civil Suit No.1589 of 1995 filed by the present respondent no.1 - Narayan, brother of defendant nos.1, 2 and 4 and uncle of defendant no.3. The suit was filed for perpetual injunction to restrain defendant nos.1 and 2 from causing obstruction to the common possession and enjoyment of the plaintiff over the suit premises viz. drainage line 30 ft. x 5 ft. on which illegal construction was put up (kitchen was built) without getting permission from the Corporation. The plaintiff's property was bearing House No.21 of Pashan within Pune Municipal Corporation and was joint family of plaintiff and defendant nos.1 to 4. The suit was

opposed initially on two grounds. Firstly on the ground that the joint holder could not seek injunction against the other joint owners and secondly unless the property was partitioned, the suit could not be entertained. As far as illegal construction was concerned, there was no averment made that the same was done after obtaining due permission from the Corporation and it was contended that the construction so done does not create any nuisance and there was an alternative drainage line already created. The trial Court considered the evidence of both the parties, the notices issued by the Municipal Corporation as well as the oral depositions of the witnesses and recorded a finding that the construction carried out was illegal, it was creating nuisance, the plaintiff had the right of access to open premises which were blocked by defendant nos.1 and 2 and, therefore, mandatory injunction was granted. The trial Court also noted that Regular Civil Suit No. 1589 of 1995 was filed on 5/10/1995 and the plaintiff had filed subsequently Civil Suit No.1 of 1996 on 1/1/1996.

2. The decree passed by the trial Court in Regular Civil Suit No.1589 of 1995 on 9/7/2002 came

to be challenged in Civil Appeal No.562 of 2002 and the same was dismissed by the learned 2nd Additional District Judge at Pune vide his judgment and order dated 13th March 2003. Hence this Second Appeal.

3. On assessment of the evidence as adduced before the trial Court the lower appellate Court held that the trial Court has correctly recorded a finding that the subject construction was illegal, had caused nuisance to the plaintiff and the new drainage line purportedly drawn was of no utility to the plaintiff. It further held that the trial Court recorded a finding that defendant nos.1 and 2 had blocked the drainage line and had carried out illegal construction on the chamber of drainage line. Inspite of having been served with the notices dated 31/5/1996, 19/6/1996, 16/8/1996 and 2/12/1996 for action to be taken under Section 392 of the Bombay Provincial Municipal Corporations Act, the defendant nos.1 and 2 had not taken any steps to remove the subject illegal construction of the drainage. There was no evidence brought on record to show that at any time the defendant nos.1 and 2 had obtained permission from the Corporation to construct on the drainage line and that too on its chamber. These

notices very clearly directed the said defendants to clear the drainage within 24 hours but the defendants did not bother.

4. The evidence further proved that the subject lane was a common lane and, therefore, it was not permissible for the defendant nos.1 and 2 to make exclusive use of the said lane and interfere with the rights of the plaintiff by causing construction. On appreciation of evidence it was also noted that the plaintiff's house is facing towards the Southern side and he has got access through the Southern side so as to proceed towards the common lane and the existence of the common lane on the Southern side was already decided in Civil Suit No.1 of 1996. The lower Appellate Court, therefore, held that the plaintiff had claimed consistent reliefs and there was no error whatsoever. As per the lower Appellate Court the documentary evidence on record indicated that the appellants had carried out illegal construction on the chamber of the drainage and they blocked the drainage line by such a construction. The findings of fact recorded by the trial Court have been reconfirmed by the lower Appellate Court on reappreciation of evidence against the defendant

nos.1 and 2 and in any case these findings do not suffer from any perversity or illegality. In these obtaining circumstances, no substantial question of law arises in the Second Appeal for consideration of this Court and hence the appeal must fail at the threshold.

5. The appeal is hereby dismissed in limine. If the appellants approach the Municipal Corporation, the Corporation will have to consider any such representation as per its Rules i.e. Development Control Rules as applicable from time to time.

6. Civil Application No.527 of 2003 does not survive and the same stands rejected. Ad-interim order stands vacated.

(B.H.MARL